STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
LANSING

RICK SNYDER
GOVERNOR

DAN WYANT
DIRECTOR

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May 7, 2012

Ms. Tinka G. Hyde, Director
Water Division
United States Environmental Protection Agency
Region 5
77 West Jackson Boulevard (W-15J)
Chicago, Illinois 60604-3507

Dear Ms. Hyde:

SUBJECT: Vessel General Permit and Small Vessel General Permit
Clean Water Act, Section 401 Water Quality Certification
Coastal Zone Management Act, Federal Consistency Certification

The following is in response to your December 28, 2011, letter to Ms. Sarah LeSage, Aquatic Invasive Species Program Coordinator, Water Resources Division, Michigan Department of Environmental Quality (MDEQ).

In that letter, the United States Environmental Protection Agency (USEPA) requested the MDEQ to make a determination regarding certification under Section 401 of the federal Clean Water Act (CWA) for the draft National Pollutant Discharge Elimination System Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels (VGP) and the Small Vessel General Permit for Discharges Incidental to the Normal Operation of Vessels Less than 79 Feet (sVGP), which were published in the *Federal Register* on December 8, 2011. The USEPA requested that any condition(s) more stringent than those contained in the draft permits that are necessary to meet the requirements of state law be included in the certification.

As you are aware, the MDEQ provided comments on the draft VGP and sVGP to the USEPA on February 21, 2012, explaining the MDEQ's view that discharges authorized by the draft permit, as proposed, would not meet Michigan Water Quality Standards. We understand that the USEPA is reviewing all comments submitted on the draft VGP and sVGP. We sincerely hope that the final permit to be issued by the USEPA by November 30, 2012, will be modified to address the concerns raised by Michigan and others. If the USEPA nonetheless were to issue the final permit with the conditions proposed in the draft permit, Michigan could certify that the discharges authorized under such a permit meet Michigan Water Quality Standards only if the conditions outlined below are met.

The MDEQ certifies that discharges from vessels covered by the USEPA's VGP and sVGP will comply with the applicable provisions of Title 33 of the United States Code, Sections 1311, 1312, 1313, 1316, 1317, and 1341, (CWA, Sections 208e, 301, 302, 303, 306, 307, and 401), and that permittees and their activities will not contravene applicable limitations, standards, and other appropriate requirements of state law, provided the conditions set forth in this letter, the VGP, and the sVGP, (Docket I.D. Nos. EPA-HQ-OW-2011-0141 and EPA-HQ-OW-2011-0150, available at http://cfpub.epa.gov/npdes/vessels/vgpermit.cfm) are met.

Certification Conditions for the VGP

1. Oceangoing vessels covered by the VGP are prohibited from discharging ballast water in Michigan's waters unless the vessel has obtained a Certificate of Coverage under the Ballast Water Control General Permit (Permit No. MIG140000) or an Individual Permit from the MDEQ and is in full compliance with the discharge limitations, monitoring requirements, and other conditions set forth in that General Permit or Individual Permit. (Section 3112[6] of Part 31, Water Resources Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended [NREPA])

2. Ballast Water Exchange and Saltwater flushing:

   (A) All vessels covered by the VGP whose voyages originate from outside the exclusive economic zone (EEZ) and enters Michigan waters with ballast onboard, shall conduct ballast water exchange at least 200 nautical miles (nm) from any shore and in waters beyond the EEZ. Such vessels that carry only residual amounts of ballast water and/or sediments shall conduct saltwater flushing of their ballast tanks, at least 200 nm from any shore and in waters beyond the EEZ. (Section 3103a of Part 31 of the NREPA)

   Ballast water exchange is defined as at least 1 empty and refill cycle of each ballast tank that contains ballast water, resulting in a salinity level of at least 30 parts per thousand (ppt). If the master of the vessel determines that such exchange is impracticable, a sufficient number of flow-through exchanges of ballast water may be conducted to achieve replacement of at least 95 percent of ballast water in ballast tanks of the vessel, resulting in a salinity level of at least 30 ppt.

   Saltwater flushing is defined as the addition of ocean water to ballast water tanks, the mixing of the flushwater with residual water and sediment through the motion of the vessel, and the discharge of the mixed water, such that the resulting residual water has a salinity level of at least 30 ppt.

   All vessels entering Michigan waters must maintain the ability to measure salinity levels in each ballast tank onboard the vessel so that salinities of at least 30 ppt can be ensured.

   (B) Condition 2(A) does not apply to vessels that:

      (i) Carry only permanent ballast water, all of which is in sealed tanks that are not subject to discharge, or
      (ii) Have the capacity to carry no more than 8 cubic meters of ballast water, or
      (iii) Use only water from a United States public water system or Canadian drinking water system as ballast water, or
      (iv) Meet the discharge limitations for living organisms set forth in Condition 3(A).

   (C) Condition 2(A) does not apply if the master of the vessel determines that compliance with this condition would threaten the safety or stability of the vessel, its crew, or its passengers because of adverse weather, equipment failure, or any other relevant condition. If a vessel is unable to conduct ballast water exchange or flushing due to serious safety concerns as specified above, the operator of a vessel shall take

responsible measures to avoid discharge of organisms in ballast water and shall inform the MDEQ in writing of the measures taken.

3. Discharge limitations for living organisms (Section 3103a of Part 31 of the NREPA):

(A) By no later than January 1, 2026, each vessel covered by the VGP whose voyage originates from outside the EEZ and enters Michigan waters with ballast onboard, shall have a ballast water treatment system that meets the following discharge limitations:

Discharge limitation for living organisms that are greater than 50 micrometers in minimum dimension: Any ballast water discharged shall contain 0.1 or fewer living organisms per cubic meter.

Discharge limitation for living organisms that are equal to or less than 50 micrometers in minimum dimension and equal to or greater than 10 micrometers in minimum dimension: Any ballast water discharged shall contain 0.1 or fewer living organisms per milliliter.

(B) Condition 3(A) does not apply to vessels that:

(i) Carry only permanent ballast water, all of which is in sealed tanks that are not subject to discharge, or
(ii) Have the capacity to carry no more than 8 cubic meters of ballast water, or
(iii) Use only water from a United States public water system or Canadian drinking water system as ballast water.

(C) Any vessel that utilizes a ballast water treatment system by December 31, 2016, that is consistent with the technologies identified in Michigan's Ballast Water Control General Permit (Permit No. MIG140000) or an alternative technology that has been approved by the MDEQ, is not required to meet the discharge limitations set forth in Condition 3(A) until the functional life of that ballast water treatment system has expired or the life of the vessel has expired, whichever is earlier. These vessels must continue ballast water exchange and saltwater flushing as described in Condition 2 unless it is demonstrated to the MDEQ that the discharge limitations set forth in Condition 3(A) are met.

(D) No extensions will be made to the January 1, 2026, implementation date unless an entity covered by the VGP makes a request to the MDEQ and can provide sufficient justification for such a request. Any such extension request shall state and demonstrate that:

(i) There is no technology or a shortage in supply of technology necessary to meet the discharge limitations set forth in this condition, or a vessel-specific engineering constraint, or other factor related to the availability and installation of technology beyond the vessel owner's/operator's control that delays the technology being available and installed in time to comply with the discharge limitations;
(ii) The lack or inadequate supply of technology or installation constraint is the only reason the January 1, 2026, implementation date cannot be met; and

(iii) The vessel has exhausted all other options to comply with the discharge limitations. Any extension request must be made no later than June 30, 2024, and the extension request shall indicate when the vessel will come into compliance with the discharge limitations.

4. Monitoring (Part 21 Rules, Wastewater Discharge Permits, promulgated under Part 31 of the NREPA):

(A) After December 31, 2016, the owner/operator of any vessel covered by the VGP whose voyages originate from outside the EEZ that discharges ballast water to Michigan waters, shall monitor ballast water discharged from their vessel at least once each year for living organisms greater than 50 micrometers in minimum dimension and living organisms equal to or less than 50 micrometers in minimum dimension and equal to or greater than 10 micrometers in minimum dimension; and submit a report summarizing the discharge monitoring results collected for the above live organism size categories to the MDEQ no later than December 31 of each year. The ballast water discharge samples shall be collected and analyzed consistent with protocols established by the MDEQ. If the MDEQ fails to establish protocols, then the requirements set forth in this condition will be waived.

(B) Any vessel that utilizes a ballast water treatment system by December 31, 2016, that is consistent with the technologies identified in Michigan's Ballast Water Control General Permit (Permit No. MIG140000) or an alternative technology that has been approved by the MDEQ, is not required to meet the monitoring requirements set forth in Condition 4(A) until the functional life of that ballast water treatment system has expired or the life of the vessel has expired, whichever is earlier.

5. The owners/operators of vessels required to utilize a ballast water treatment system shall allow the MDEQ reasonable entry onto the vessel for inspection, access to records, and collection of a ballast water discharge sample(s) for determining compliance with this Certification and applicable laws. (R 323.2149 of the Part 21 Rules of the NREPA)

6. Nonoceangoing vessels covered by the VGP that operate ballast water treatment systems are prohibited from discharging ballast water in Michigan waters with total residual chlorine concentrations above 38 micrograms per liter (µg/L) when the ballast water discharge duration exceeds 160 minutes, or above 200 (µg/L) when the ballast water discharge duration is less than or equal to 160 minutes. (R 323.1057 of the Part 4 Rules, Water Quality Standards, promulgated under Part 31 of the NREPA)

7. The MDEQ reserves the right to modify this Certification, after appropriate public notice, to require nonoceangoing vessels covered by the VGP to install and operate ballast water treatment systems to prevent the discharge of aquatic invasive species to Michigan waters, if a determination is made by the MDEQ director that such ballast water treatment systems are necessary, available, and cost effective. (Part 31 of the NREPA)

<u>Certification Conditions for the VGP and sVGP</u>

8. Discharges of blackwater and graywater from vessels covered by the VGP or sVGP are prohibited to Michigan waters. (Part 95, Watercraft Pollution Control, of the NREPA)

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9. Vessel owners/operators shall immediately notify the MDEQ whenever they become aware that a discharge from their vessel causes or contributes to an exceedance of an applicable state water quality standard. (Part 21 Rules of the NREPA)

10. Nothing in this Certification diminishes, negates, or precludes the state of Michigan from bringing civil and/or criminal actions for violations of state law and/or issued state permits. (Part 31 of the NREPA)

11. Each condition in the proposed VGP and sVGP cannot be made less stringent without potentially violating the requirements of state law, including water quality standards. (Part 31 of the NREPA)

12. If the MDEQ determines that vessel discharges covered by this Certification can no longer comply with Section 401 of the CWA or state laws and regulations, then the MDEQ may revoke or modify this Certification after appropriate public notice. (CWA, Section 401)

In response to your December 28, 2011, and March 7, 2012, letters to Mr. Chris Antieau, Great Lakes Shorelands Unit, Water Resources Division, MDEQ, requesting Coastal Zone Management Act, PL 92-583, as amended, consistency determination, staff of the MDEQ reviewed the VGP and sVGP for consistency with Michigan's Coastal Management Program (MCMP), as required by the Coastal Zone Management Act. A determination of consistency with MCMP requires evaluation of a permit to determine if it will have an adverse impact on coastal land or water uses or coastal resources. In this case, obtaining a Section 401 Water Quality Certification is required to be compliant with MCMP and to obtain the Federal Consistency Certification for the draft VGP and sVGP. As long as all Conditions set forth above as part of the Section 401 Water Quality Certification are fully complied with, the draft VGP and sVGP are consistent with MCMP.

The contact point for consultation, submittals, and approvals as referred to in this Certification is:

Chief, Water Resources Division
MDEQ
P.O. Box 30458
Lansing, Michigan 48909-7958
Phone: 517-335-4176

The MDEQ reserves the right to challenge the USEPA's VGP and sVGP.

Should you require further information regarding this Certification, please contact Ms. LeSage at 517-241-7931, or you may contact me.

Sincerely,

William Creal, Chief
Water Resources Division
517-335-4176

cc: Mr. Dan Wyant, Director, MDEQ

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Mr. Jim Sygo, Deputy Director, MDEQ
Ms. Sarah LeSage, MDEQ
Mr. Chris Antieau, MDEQ